> cannot determine its validity and this is especially true since the action is that of the legislative branch of the government, of which we are an arm and of whose intention we can have no doubt."

There is no doubt that a treaty is not only a contract between sovereign nations but may contain provisions which affect local law within the nation. *Missouri* v. *Holland*, 252 U.S. 416 (1920). The Senate, in connection with its treaty-making powers,[1] is not a mere rubber stamp for the executive. It is true that ordinarily it is the President who originates treaties and negotiates with a foreign nation but he is unable to conclude such treaties without the advice and consent of the Senate. The Senate has the duty of both "advice" and "consent". Both of these terms are important and were so deemed by our founding fathers. Consequently, the Senate has the right to advise reservations and amendments to a proposed treaty and has done so on many occasions. Thus, in the original United States-Canadian Boundary Waters Treaty of 1909 the Senate proposed, and there was adopted, an amendment of understanding. In fact, the Jay Treaty of 1794,[2] the first made by this country after the adoption of the Constitution, was not consented to by the Senate as originally proposed. Instead, the Senate advised and consented to ratification only after an amendment of the proposed terms of the treaty.

The treaty involved here was, as usual, originally sent by the President to the Senate. The Senate advised and consented to ratification upon conditions set out in the reservation. Canada accepted the reservation and, thereafter, on August 24, 1950, the President ratified the treaty as conditioned by the Senate. Canada ratified on October 5, 1950, and the reservation was included in the protocol evidencing the exchange of ratification by the United States and Canada.

---

[1] U. S. Const. Art. II, § 2.

[2] 8 Stat. 116 (1794), 1 Malloy Treaties, 590 (1910).

I

Petitioner argues, and the majority holds, that what was called a reservation by the Senate, the President, State Department officials, and the Canadian Government, was not truly a reservation, but merely a declaration of Senatorial policy which has no binding effect. The basis of this argument is that standing alone, without considering other factors, the reservation was a matter of domestic concern having no effect on the rights and duties of the sovereign parties to the treaty, whereas a valid reservation must alter the rights and duties of the parties under the treaty as originally proposed. No need exists for an esoteric discussion of whether the language in question conforms to the scholar's definition of a treaty reservation. If the Senate conditioned its advice and consent to the treaty upon inclusion of the language in question and upon its being given an operative effect—if the Senate did so condition its consent—if the condition was a *sine qua non* to its consent and to ratification—if but for its condition being given effect the Senate would not have consented to the treaty—then regardless of what the language in question is called it must be given effect. Believing this to be the only proper approach to petitioner's contention, I would dispose of that contention by determining the intent of the Senate when it insisted upon inclusion of the language in question in the treaty.

As will be shown in more detail later, the Senate was aware, at the time the treaty was submitted, of pending legislation relative to the development of water-power resources of the Niagara River.[3] It was likewise aware that if the treaty was ratified as written the additional water power available for exploitation by this country would be developed pursuant to the Federal Power Act, *supra*.[4] Whether it should be developed pursuant to that

[3] Senate Executive Report No. 11, 81st Cong., 2d Sess. 6-7 (1950).

[4] *Id.* at 7.

Act or according to the terms of later legislation was a matter of considerable concern to the Senate. If the language of the reservation does not make this clear, and I think it does, then the report of the Senate Foreign Relations Committee does.[5] There is no reasonable construction of the plain language of the reservation or of its legislative history other than this: The Senate desired to consent to the proposed treaty, but not at the expense of foreclosing from the consideration and decision of the Congress at large the question of how the water power would be developed. We should not assume that this reservation, arising from due deliberation, was an idle gesture. Its language is straightforward and to the point. Its meaning is clear. I do not see how we can avoid giving effect to it according to its terms. Of course, if the reservation was beyond the constitutional power of the Senate, it cannot be given effect. If it is beyond the power of the Senate, then not just the reservation falls, but the entire treaty. How can it be otherwise when the Senate has made it abundantly clear that without the reservation it would not have consented to the treaty?[6]

No authority can be found for holding a treaty valid while rendering a Senatorial reservation to it nugatory. *New York Indians* v. *United States*, 170 U.S. 1 (1898), referred to by petitioner, certainly does not do so and has no application to the case before us. In *New York Indians*, the Senate proviso was never incorporated in the text of the treaty; it was not contained in the original or published copy of the treaty; nor was it contained in the Presidential proclamation of the treaty. The Supreme Court indicated that it believed the Senate resolution in question was "mainly directory" and stated " . . . it is difficult to see how it can be regarded as part of the treaty or as limiting at all the terms of the

---

[5] *Id.* at 6, 7.

[6] *Id.*

grant."[7] The Court also pointed out that there was no evidence that the Senate amendment of the proposed treaty had ever had the sanction or approval of the President.

Even if the proviso in the Indian treaty were intended as a reservation, that case is clearly distinguishable in important particulars. There the United States sought to invoke the reservation to the detriment of the other parties to the treaty. Also, the United States was doing so despite the fact that the other parties had acted on the basis of the treaty as proclaimed and had no knowledge of the proviso. The Court said that to permit the United States to invoke the proviso "shocks the conscience."[8] This is the language of an estoppel. Upholding a treaty while declaring void a reservation such as this one, and upholding a treaty while estopping the government from asserting an uncommunicated reservation are entirely different situations. Certainly the latter is not authority for the propriety of the former.

Enough has been said already to indicate my disagreement with a holding that the reservation is not a part of the treaty and that the treaty is effective without it.

II

Before turning to petitioner's argument that the reservation in question is beyond the Senate's constitutional power it is important to carefully delineate what is *not* before the court in this case. Doing so should be an aid to a proper understanding of what is. First, the Senate has not by its reservation sought to extort as its price for ratifying the treaty that it be allowed, independently of the Congress at large, to determine the nature and status of domestic legislation or policy. It has not provided that its conditional ratification is to be

---

[7] 170 U.S. at 23.

[8] *Ibid.*

regarded as withdrawn if the Federal Power Act *is ever applied* to the water in question. It has merely left the question as to whether that Act or some other should be applied open to determination of both houses of Congress and the President. It has not demanded its way. Its reservation is not self-serving, but purports to extend to the Congress and the President a voice in determining how the increased water supply will be developed. This then is a case where the Senate has not sought to limit the participation of the Congress at large and the President in decisions regarding domestic policy. It is a case in which the Senate has sought to enlarge their participation.

Secondly, this is not a case in which the Senate has exacted as a price for its ratification of a treaty that some new, nonexisting legislation become law. Nor is it a situation where ratification is conditioned on non-application of some general statute not germane to the subject matter of the treaty.[9]

This is simply a case where the Senate has conditioned ratification upon the non-application of the Federal Power Act to the additional water supply made available by the treaty, and provided that decision as to how and by whom that resource is to be developed shall be held in abeyance.[10] These are matters directly germane to the subject matter of the treaty. This is the only case before this court. Those other situations can well await decision in cases where they are presented. The grave constitutional issues they present should not prejudice or cause us to pre-judge this case.

I must disagree with the implication in the majority opinion that this reservation, if a part of the treaty,

---

[9] For example, that the Taft-Hartley Act or the Walsh-Healy Act not be applied to employers and employees engaged in development of the water rights obtained pursuant to the treaty.

[10] Of course this would leave the Congress free to provide by legislation, if it chooses, that the Federal Power Act should apply.

would be invalid. The majority say the reservation is not a part of the treaty. There is a definite suggestion that their conclusion is influenced, if not dictated, by a belief that if the reservation were construed as a part of the treaty, then the treaty would be unconstitutional. I can appreciate the majority's reluctance to hand down the first decision invalidating a treaty of the United States. But I cannot, as indicated above, agree that the reservation is not an essential part of the treaty. Nor can I agree that its being a part of the treaty renders the treaty invalid. We are told that the reservation is void because it is regarded as of "purely domestic concern" and therefore not a valid subject matter for a treaty reservation. It is elementary law that treaties may and frequently do affect domestic concerns. Indeed, treaties may repeal previous municipal law passed by the Congress or by state legislatures.[11] Therefore, if this reservation is void, it is not because it affects domestic law to the extent that it requires that the Federal Power Act not apply to the additional water power made available by the treaty.

If void, it must be because the reservation is not only of domestic concern, but is also remote from the valid subject matter of the treaty, and is not inspired by consideration of or pertinent to international relations or policy. While it is true that the President and officials of the Department of State have referred to the question of how the water power made available by the treaty was to be exploited as a matter of domestic concern, certainly that question is not remote from but is germane to the subject matter of the treaty. At the time the treaty was submitted to the Senate for rati-

---

[11] Cases recognizing this are: *Cook* v. *United States*, 288 U.S. 103 (1933); *Whitney* v. *Robertson*, 124 U.S. 190 (1888); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870); *Foster* v. *Neilson*, 27 U.S. (2 Peters) 253 (1829); *Ware* v. *Hylton* 3 U.S. (Dall.) 199 (1796).

fication, the question of how and by whom water-power resources of the Niagara River would be exploited was a controversial issue in the Congress. With this controversy in mind, the Senate Foreign Relations Committee, in its report on the treaty, pointed out that extensive public hearings on implementing legislation would probably be necessary. The Committee recognized that it would take considerable time to complete such hearings and to obtain final Congressional action on the pending legislation.[12] Yet the Committee and the Senate as a whole were reluctant to jeopardize the rights which this country would receive under the proposed treaty by delaying its ratification until after Congress had acted upon the pending legislation concerning Niagara River power development. Also, the Senate Committee report reflects a regard for our friendly relations with Canada and stated that prompt ratification of the treaty would "constitute a gesture of good will toward our friendly neighbor, Canada".[13] Another reason given by the Committee for its recommendation of prompt ratification with the suggested reservation was "in order to relieve the acute power shortage in Canada".[14]

Because of the possibility that the Canadians might in the absence of the treaty be compelled to take some unilateral action in harnessing the Niagara power, because undue delay might prejudice our good relations with Canada, and in view of an asserted acute power shortage in Canada requiring speedy ratification, this reservation was intimately and inseparably bound up in international questions. In this context it is *not* purely a domestic concern. If the subject matter of the reservation is domestic in nature, *it was nonetheless inspired by, an outgrowth of, and inextricably connected with, an admittedly valid subject matter of a treaty.* It is not required as a

---

[12] See note 3 *supra.*

[13] *Id.* at 7.

[14] *Id.* at 6.

condition to validity that the reservation be in and of itself, treated in artificial isolation or detachment, a domestic matter properly a subject of contract between sovereigns. It is sufficient if it is directly related to a general subject which is properly a matter for contract between sovereigns, and if international policies and considerations are the *raison d'être* of the reservation. As no properly negotiated and ratified treaty of the United States has ever been held invalid there can be no binding judicial authority in support of petitioner's argument for unconstitutionality. Nor is there support in the dicta and comments of the text writers cited by petitioner for the proposition that a reservation or treaty to be valid must have a subject matter which independent of all other considerations is a matter of international concern. Petitioner quotes from *Geofroy* v. *Riggs*, 133 U. S. 258, 267 (1889): "But with these exceptions, [none of which are applicable here] it is not perceived that there is any limit to the questions which can be adjusted [by treaty] *touching any matter which is properly the subject of negotiation with a foreign country.*" [Emphasis supplied] From another case [15] appellant quotes: "The treaty-making power . . . extends to all proper subjects of negotiation with foreign governments." *Asakura* v. *Seattle*, 265 U. S. 332, 341 (1924) is quoted as saying the treaty power extends " . . . to all proper subjects of negotiation between our Government and other nations." Also quoted is language from *Santovincenzo* v. *Egan*, 284 U. S. 30, 40 (1931) where the Court said the treaty power " . . . is broad enough to cover all subjects that properly *pertain* to our foreign relations . . . " (Emphasis supplied) Other statements of like effect are quoted. In the first place each of these statements was written in emphasis of the extent of the treaty power, not in diminution of it. Furthermore, applying the criteria of these cases here does

[15] In re *Ross*, 140 U.S. 453, 463 (1891).

not dictate a conclusion that this reservation is invalid. Certainly in the language of *Geofroy* v. *Riggs, supra,* it "*touches*" a matter properly the subject of negotiation with a foreign government. Likewise it "*properly pertains*" to our foreign relations, to use the language of the *Santovincenzo* case.

Secretary of State Dulles is quoted by the majority as having stated that the treaty power may not be exercised with respect to matters " . . . *which do not essentially affect* the actions of nations in relation to international affairs, but are purely internal." [Emphasis supplied]

> " . . . I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern."

A former Secretary of State and Chief Jusice, Charles Evans Hughes, is also quoted by the majority. That quotation in its essential part is:

> "It [the treaty power] is not a power intended to be exercised, it may be assumed, with respect to matters that have *no relation* to international concerns . . ." [Emphasis supplied]

However true these statements, they should not be regarded as support for finding this reservation invalid. It does not circumvent our constitutional processes; it does affect our international relations; it is related to an international concern.

As I believe this is the proper analysis of whether the reservation is valid, I can only conclude that it was a valid exercise of the Senate's power to consent to a treaty upon an express reservation being attached and given effect.

III

My view that a reservation is valid if it is inspired by, an outgrowth of, and inextricably connected with, an ad-

mittedly valid subject matter of a treaty is not without historical precedent. One precedent which is contrary to petitioner's narrow view of the treaty power is the Webster-Ashburton Treaty of 1842. That treaty settled the northeast boundary of the United States and Canada. The agreement settling the boundary dispute gave to Canada some territory claimed by Maine and Massachusetts. As compensation to those states for the loss of the territory they had claimed, the federal government agreed to pay them a fixed sum of money. The terms of this agreement with the state governments was reflected in the language of the treaty in the following terms,

> "... the Government of the United States agree[s] with the States of Maine and Massachusetts to pay them the further sum of three hundred thousand dollars, in equal moieties, on account of their assent to the line of boundary described in this treaty, and in consideration of the conditions and equivalents received therefor from the Government of her Britannic Majesty."[16]

Lord Ashburton wrote to Daniel Webster that "the introduction of terms of agreement between the general government and the States [of the United States] would have been irregular and inadmissible, if it had not been deemed expedient to bring the whole of these transactions within the purview of the treaty. There may not be wanting analogous cases to justify this proceeding; but it seems proper that I should have confirmed by you that my government incurs no responsibility for these engagements ..."[17]

Surely the agreement between the federal and state governments had in and of itself no bearing on the international rights and duties of the two contracting sovereigns. It in no way affected what the two nations gave

---

[16] 8 STAT. 572, (1848); 1 Malloy, Treaties 650, 654 (1910).

[17] 6 Webster, Works 289 (1853).

or received as between themselves. Treated separately, in isolation from a matter which was a valid subject of a treaty, the provision referred to was entirely domestic and concerned our constitutional processes alone. Under petitioner's concept of the treaty powers, the quoted provision of the Webster-Ashburton Treaty would have been invalid and of no effect. Yet the Congress promptly appropriated the money obligated to Maine and Massachusetts without questioning the propriety of the treaty provision.[18]

In the treaty with Spain transferring Puerto Rico to this country, it was provided: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[19] Legally the political status of inhabitants of newly acquired territory is a question purely of domestic concern. It is a matter for our own constitutional processes. Any foreign interference in such matters would be grossly improper. When this treaty came before the Supreme Court in *Downes* v. *Bidewell*, 182 U. S. 244 (1901) the issue was whether the Constitution imposed the same limitation on Congress in regard to Puerto Rico as it did to the states. The Court concerned itself with the power to incorporate new territories by treaty, and whether the terms of its incorporation could be fixed by treaty. In doing so the provision of the treaty quoted above was considered. Four justices questioned the power to establish the terms incorporating new territory by treaty alone, but specifically endorsed the provision in the treaty that the political status of the inhabitants of the new territory could be left by treaty to await later congressional enactment.[20] The opinion of

---

[18] 5 STAT. 623 (1850).

[19] 30 STAT. 1754, 1759 (1899); 2 Malloy, Treaties 1688, 1693 (1910).

[20] 182 U.S. at 312.

Mr. Justice Brown, whose opinion was the judgment of the Court, recognized that a provision in a treaty governing the status of the inhabitants of the newly acquired territory was proper, and that a provision leaving the question of their status to later enactment was also valid.[21]

The recital of these two precedents, which are contrary to petitioner's narrow and conceptionalistic "contract" theory of the treaty power, should not be taken to imply a lack of other historical precedents, for such is not the case.

My colleagues recognize that the Senate could have made the treaty executory by providing in its consent that the rights and obligations of both signatory parties take effect only after passage of an act of Congress. They say, however, that the Senate did not do so. While I agree with this, I cannot agree that the Senate has no power to make the treaty executory as to this country alone.

There are many instances where the Senate has extended to the House of Representatives a voice in determining how treaties will be implemented. The Senate has on many occasions done this by insisting that a treaty not be effective until approved or implemented by an act of Congress. This is particularly so as regards treaties affecting revenues. 1 *Willoughby, The Constitutional Law of the United States,* 558-560 (2d ed. 1929). It is also worthy of note that denial of House participation in domestic legislation effectuated by treaty has been one of the most common causes of controversy over the treaty power.

It is my view that recognition of the Senate's power to condition its consent to a treaty upon its remaining executory on both sides until Congress passes legislation to give the treaty operative effect carries with it

[21] *Id.* at 279-80.

recognition that the Senate may condition its consent upon the treaty not having an operative effect in this country alone until Congress acts. In either event the treaty rights and duties are the same. In one instance both parties are bound to await an act of Congress before exercising their rights under the treaty, whereas in the second instance, which is the case here, only this country is bound to await an act of Congress before availing itself of the rights allotted by the treaty. Why cannot the Senate make the reduction to use of the treaty rights by the United States await an act of Congress? The Senate had no desire to delay Canadian implementation of the treaty; indeed, it recognized that good relations with Canada required that this country not postpone Canadian power development. I see no reason why the Senate must delay our Canadian friends in order to make reduction to use of our water rights under the treaty await congressional enactment.

For compelling practical reasons, based upon international considerations requiring that Canadian execution of the treaty not be delayed, the Senate consented to the treaty, on condition that it remain executory until Congress at large had acted. The Senate has, in the only way it could under the circumstances, sought to insure full legislative determination of a serious domestic issue. I can conceive of no practical objection to this, nor has any been pointed out to me.

While I do not agree with petitioner's narrow contract theory, even if it is correct I nonetheless do not believe it would make this reservation invalid. Petitioner maintains that to be a valid subject matter of a treaty the subject must, standing alone, be a matter of concern to the sovereign parties, and be a proper subject of contract between the parties. I regard this reservation as within that narrow classification. This can be demonstrated with the aid of a realistic assumption of fact.

The text of the treaty indicates the great concern of Canada and our country for not diminishing the scenic beauty of Niagara Falls.[22] This concern was the impetus of this and the earlier treaty concerning Niagara River water power.[23] Assume there was no Federal Power Act or that by that Act's terms it was inapplicable to the Niagara River. Having a legitimate interest in the scenic attraction of Niagara Falls, Canada might well be unwilling to agree to making more water power available if it feared unregulated, irresponsible exploitation of the water resources of the river. Such exploitation might very well be regarded as a menace to the economic and aesthetic interest of Canada in Niagara Falls. Under this assumption, how the water power made available to the United States would be developed would be a matter of prime importance to Canada. That concern might, in the situation assumed, induce Canada to insist upon our share of the water being harnessed subject to regulations protective of the scenic beauty of Niagara Falls. If it be conceded, as I think it must be, that how we develop water-power resources obtained by treaty may be a matter of concern to Canada and not purely a domestic concern, then the reservation in question is within the narrow confines of the treaty power as petitioner views it.

That the Senate and not Canada proposed this reservation does not change the subject matter, but that is the test petitioner proposes. The identity of the party making a proposal cannot change its nature or subject matter. It is still the same proposal. That there is a Federal Power Act and that, but for the reservation, it would apply does not alter the subject matter of the reservation. The existence or nonexistence of domestic legislation is

---

[22] Articles II and IV of the treaty.

[23] See Senate Executive Report No. 11, 81st Cong., 2d Sess. 3 and 5 (1950).

clearly not a test of the treaty power. Nor does it change the subject matter of a reservation.

Thus, under a simple and realistic assumption, the reservation can be established as a proper matter for negotiation and contract between sovereigns. Then, even under petitioner's view, it is valid. There is a further basis for attributing to Canada an interest in the reservation. Every party to a proposed treaty which it has negotiated has an interest in that treaty being ratified. If it believes that inclusion of certain terms will win ratification, and non-inclusion would bar ratification by the other party, then those terms are of concern to it. Here Canada did not for these reasons propose the terms of the reservation in question; but it has the same interest in this reservation as if it had done so. This is merely because without the reservation Canada would have had no treaty.

To say that this reasoning is incorrect because Canada did not propose the terms of the reservation is to say that certain terms proposed by a foreign government are the valid subject matter of a treaty, and may affect domestic law, while the same terms included at the insistence of the Senate are invalid because they do not have a valid subject matter. Is not the subject matter the same regardless of who proposed it? Is not the effect on domestic law the same? Is there any basis for achieving a different result except perhaps for theoretical, abstruse or academic reasons? I do not believe the constitutional power to make treaties should be restricted for such reason when every practical, realistic consideration favors the power to do what the Senate and the President have done here.

Conclusion.

It may well be that, no matter how broad the power to make treaties, it is not without limits; and that, like any other power, it can be abused. This case, however, does not pose an abuse of the treaty power. The reser-

vation in question is an instance of self-denial, not usurpation. It does not subvert our constitutional system. It was motivated by a desire that the treaty power should not be used in a manner which would exclude the Congress at large and the President from playing their normal roles in making domestic law.

Unless it can be said that petitioner has a right to have the Senate not make treaties executory in their internal operation, no one is legally injured. Whether treaties should be thus executory seems strictly a political question. Clearly, it is as political a matter as whether the President chose to negotiate a treaty or whether the Senate chose to consent to a treaty negotiated. It would seem that it would be time enough to describe the limits of the treaty power when a case arises where our constitutional scheme of government is subverted, or where there is some usurpation of power, or where what is done under the treaty power is adverse to a legal right of some person or entity.[24]

If petitioner's narrow view of the treaty power is approved by the courts, it would constitute an unfortunate limitation on that power. If the language of the Constitution, the nature of the governmental system it contemplates, or binding judicial authority supported petitioner's theory, its validity would have to be recognized and its effects endured. But there is no support for that theory in our charter of government, nor does it find support in the nature of our political system. There are no judicial authorities favoring that theory.

These reasons being absent, I cannot, on the basis of theory, dicta and text-book definitions, narrowly circumscribe the signally important power to make treaties.

---

[24] See *The Treaty Makers and The Law Makers; The Niagara Reservation*, an excellent and cogently reasoned discussion by Louis Henkin, a member of the Columbia Law School faculty. 56 Columbia L.R. 1151.

APPENDIX B

Opinion and Order Dismissing Application for License

[Tr. p. 658]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter

of

Power Authority of the State of New York
Project No. 2216

Opinion No. 298

Appearances

For the People of the State of New York
Jacob K. Javits, Attorney General of the State o
New York.

For the Power Authority of the State of New York
Thomas F. Moore, Jr., Esquire, New York, New Yor
Samuel I. Rosenman, Esquire, New York, New Yor
Philip C. Jessup, Esquire, New York, New York.

For American Public Power Association, et al.
Northcutt Ely, Esquire, Washington, D. C.

For National Rural Electric Cooperative Association an
Rural Electric Cooperatives
Lawrence Potamkin, Esquire, Washington, D. C.

For Rochester Gas and Electric Corporation
Edward F. Huber, Esquire, New York, New York

For the Staff of the Federal Power Commission
John C. Mason, Esquire, Washington, D. C.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[Tr. p. 659]

BEFORE COMMISSIONERS:

Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

IN THE MATTER

of

POWER AUTHORITY OF THE STATE OF NEW YORK

PROJECT No. 2216

Opinion No. 298

OPINION AND ORDER DISMISSING APPLICATION FOR LICENSE
(Issued November 30, 1956)

There is before us an application by the Power Authority of the State of New York under Section 4 (e) of the Federal Power Act for the issuance of a license for a hydroelectric project (Project No. 2216) to develop and utilize all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the 1950 treaty between the United States and Canada. The principal questions which arise are whether a reservation made in the treaty as a condition to the advice and consent of the United States Senate thereto is valid and therefore effective to prevent our jurisdiction attaching to the water diverted under the treaty and whether, in any case, we are empowered to pass upon the validity of the treaty reservation.

The present application was filed August 20, 1956, with an amendment thereto, September 19, 1956. A number of petitions to intervene were granted by the Commission by orders issued October 25, 1956, and November 1, 1956, as follows: Niagara Mohawk Power Corporation, Attor-

ney General of the State of New York on behalf of the People of New York, National Rural Electric Cooperative Association and 28 rural electric cooperatives or associations distributing electric power in the States of New York, Ohio and Pennsylvania, Rochester Gas and Electric Corporation, County of Niagara, New York, City of Niagara Falls, New York, American Public Power Association, Municipal Electric Utilities Association of New York State, City of Jamestown, New York, and the Town of Lewiston, New York. Oral argument was held on November 14, 1956, at which the application, the 1950 treaty, and the reservation were discussed in detail.

[Tr. p. 660] The application proposes a project which, briefly, would consist of an intake structure located about three miles above the falls on the Niagara River, two covered conduits extending about 4.5 miles from the intake around the falls to a proposed pumping-generating plant and reservoir at Lewiston, New York, an open canal by which the water will be carried about one mile from the pumping-generating plant and reservoir to the main powerhouse, which is also located at Lewiston at the edge of the river and consists of intake structures on the top of the cliff, and a generating station at the bottom of the cliff containing thirteen 150,000 kw units.

Up to now power development on the American side at Niagara Falls has been under the authority of a license issued on March 2, 1921, for Project 16 and now held by Niagara Mohawk Power Corporation. Niagara Mohawk's Schoellkopf generating station at the Falls was rendered inoperative by a rock slide on June 7, 1956, but the company has filed an application requesting authority to restore the station in part. The application of Power Authority proposes that if Niagara Mohawk will consent to the surrender of its license for Project 16 it will sell it an amount of power equivalent to that which it has hitherto produced by this project.

Power Authority's proposal is designed to make use of all the water available under the 1950 treaty; the purpose of which was to preserve the beauty of Niagara Falls and to bring about the full use of the water resources of the Niagara River. The American share up to the time of the treaty had been only 32,500 cfs, made available under the treaty of 1909 and through subsequent exchanges of notes between the United States and Canada, and has been utilized, up to the time of the rock slide, by Niagara Mohawk's Project 16. The 1950 treaty increased this amount by providing that the United States and Canada should divide equally the water flowing in the Niagara River (with certain adjustments) less 50,000 cfs at certain times and 100,000 cfs at other times, to preserve the beauty of the Falls.

When the Senate of the United States on August 9, 1950, advised and consented to the ratification of the 1950 treaty, it included the following reservation:

> The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States' share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress (1 UST 694, 699).

[Tr. p. 661] Thereafter Canada accepted the reservation and on August 24, 1950, the treaty, including the reservation, was ratified by the President of the United States. It was ratified by Canada on October 5, 1950. Ratifications were exchanged at Ottawa on October 10, 1950. The treaty was proclaimed by the President on October 30, 1950, and entered into force October 10, 1950.

It is clear that the purpose of the reservation was to require further action by Congress prior to redevelopment

of the power site at Niagara Falls. The Senate Committee Report (Executive Rept. No. 11, 81st Cong., 2d Sess., p. 7) states:

> Thus without the reservation the redevelopment for power purposes would be governed by the Federal Power Act. The committee intends by the reservation to retain that power in the hands of the Congress.

In the absence of the treaty reservation we would act on the Power Authority's application in accordance with the provisions of the Federal Power Act. But if we are to accept the injunction of the reservation as it stands, we would have no authority to consider the application of the Power Authority on its merits.

In its application and oral argument the Power Authority contends that the reservation is not a part of the treaty because it relates entirely to a matter of domestic concern in that it attempts to amend or repeal in part the Federal Power Act. Therefore, it argues, the reservation cannot supersede the Power Act as a treaty and cannot do so as an act of Congress as it only represents action on the part of the Senate. There is involved a question of whether this type of reservation may be attached to the treaty under Article II, Section 2 of the Constitution, which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur, * * *," and whether the reservation here became a part of the treaty through its acceptance by Canada and proclamation by the President.

However, we do not believe that we can reach any of these questions. We have several times said and have been supported by the authorities that we will not determine the constitutionality of an act of Congress. *East Ohio Gas Co.*, 1 F. P. C. 586, 592; *Mississippi River Fuel Corp.*,

2 F. P. C. 170, 175; *Central Nebraska Public Power and Irr. Dist.*, 5 F. P. C. 165, 172; *Panitz* v. *District of Columbia*, 122 F. 2d 39, 41-42 (C. A. D. C.); *Todd* v. *S. E. C.*, 137 F. 2d 475, 478 (C. A. 6); *Engineers Public Service Co.* v. *S. E. C.*, 138 F. 2d 936, 952 (C. A. D. C.); *Davies Warehouse Company* v. *Bowles*, 321 U. S. 144, 152-153. [Tr. p. 662] Where, as here, there is action by the Senate,* which was ratified by the President purportedly under the treaty-making power of the Constitution, we likewise cannot determine its validity and this is especially true since the action is that of the legislative branch of the government, of which we are an arm and of whose intention we can have no doubt.

Since the reservation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as "the supreme Law of the Land" under Article VI of the Constitution. Thus assuming the validity of the reservation, before we may consider the Power Authority's application on its merits, it would seem the Congress must take action in

---

*A committee of the House of Representatives apparently assumed the validity of the treaty reservation when in 1953 a bill, H. R. 4351, 83d Cong., 1st Sess., was introduced which would have amended the Federal Power Act and authorized issuance of a license on this project. The report on the bill (House Report No. 713), stated (p. 4):

> "This reservation was adopted pursuant to the recommendation in the report of the Senate Committee on Foreign Relations. The Committee recommended that the Congress instead of the Federal Power Commission under the Federal Power Act decide what method of additional development is in the best public interest."

To the same effect, see House Report No. 2635, 84th Cong., 2d Sess. (1956), p. 7. None of the bills introduced into the Senate or House passed Congress.

accordance with the reservation to permit redevelopment under the Federal Power Act of the waters of the Niagara River made available by the 1950 treaty.

The Commission further *finds:*

We are without authority to issue a license for the redevelopment (Project No. 2216) proposed by the Power Authority of the State of New York.

The Commission *orders:*

The aforesaid application for license for Project No. 2216 is dismissed.

By the Commission.

LEON M. FUQUAY,
Leon M. Fuquay,
Secretary.

[Tr. p. 663]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter

of

Power Authority of the State of New York
Project No. 2216

(Issued November 30, 1956)

Digby and Stueck, Commissioners, *concurring:*

We agree with the majority that the question of whether the reservation initiated by the Senate to the 1950 treaty is valid and binding upon this Commission is not a matter on which we are empowered to make a determination. However, we believe that the Commission's position should be clear in any court proceeding that may arise so as to avoid an unnecessary remand to make a determination that could be made here without entering at all into the merits of the case. Therefore we have considered the treaty reservation as to whether it is properly part of the 1950 treaty, and conclude that it is part of such treaty and "supreme Law of the Land" under the authority of Article VI of the Constitution of the United States.

In the first place it is plain that a treaty is not only a contract between sovereign nations but may contain provisions which affect local law within the nation (see *Missouri* v. *Holland*, 252 U. S. 416) and it is said that the treaty-making power is in terms unlimited (see *Geofroy* v. *Riggs*, 133 U. S. 258, 266-267).

The broad treaty powers are initially at the disposal of the President, who is free to enter upon and carry on negotiations with another country without advising the Senate. In order, however, to give the Senate an effective part in treaty making, the Constitution prevents the conclusion of international treaties except upon the advice and consent of the Senate. If, notwithstanding this apparent

coordinate authority in treaty making, the Senate may do nothing more than give or withhold its consent, a treaty otherwise desirable from the standpoint of the national interest might fail of passage.

It has long been recognized that the Senate may specify reservations, understandings, or other forms of amendment in a proposed treaty in giving its advice and consent to subsequent ratification by the President, *Doe* v. *Braden*, 16 How. 635, 656(57 U. S. 327, 330). In addition, at page 81 of Crandall on "Treaties Their Making and Enforcement" (2d Ed. 1916), it is said [Tr. p. 664]:

> Not usually consulted as to the conduct of negotiations, the Senate has freely exercised its co-ordinate power in treaty making by means of amendments. In case a treaty as negotiated is not acceptable in some of its provisions to the Senate, it is the practice of that body, if it gives its advice and consent to the ratification, to do so with specific amendments, which renders unnecessary the re-submission of the instrument after the consent of the other party to the designated changes has been obtained. . . .

In its Resolution of March 3, 1909, advising and consenting to the proposed United States-Canadian Boundary Waters Treaty of 1909, the Senate set forth an amendment of understanding, relating to rights of owners of lands under water on either side of the international boundary and other matters of domestic concern, which was accepted by the Government of Great Britain prior to its ratification (see Senate Document No. 165, 83d Cong., 2d Sess., p. 111).

When the Senate gave its advice and consent to the ratification of the Mexican Water Treaty of 1945, it attached numerous reservations. Reservation (a) included by the Senate in that treaty (59 Stat. 1219, 1263-1264), provides:

> (a) That no commitment for works to be built by the United States in whole or in part at its expense, or for expenditures by the United States, other than

those specifically provided for in the treaty, shall be made by the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, or any other officer or employee of the United States, without prior approval of the Congress of the United States. • • •

This reservation is very similar to the reservation included in the 1950 treaty with Canada.

It does not appear to us material to determine whether the 1950 treaty created a new source of water for the generation of power or relieved a limitation on an existing source. In any case the effect of the treaty was to make available greater hydro resources for use in the United States which otherwise could not be touched without the possibility of our affecting our relations with Canada. The Senate could have chosen to refuse to give its consent to the treaty. It did not do so, but was privileged to do as it did, to give its consent only on condition that the waters made available be developed as specifically authorized by Congress. The [Tr. p. 665] reservation thus represented an exercise by the Senate of its prerogative to advise and consent in the treaty-making process.

.....

Seaborn L. Digby, Commissioner

.....

Frederick Stueck, Commissioner

[Tr. p. 694]

APPENDIX C

[TITLE OF COMMISSION AND PROCEEDINGS OMITTED]

Order Denying Rehearing

(Issued January 2, 1957)

Application for rehearing of the Commission's opinion and order issued November 30, 1956, in this matter, was filed by the Power Authority of the State of New York on December 4, 1956.

The Commission finds:

The assignments of error and grounds for rehearing of the opinion and order of November 30, 1956, set forth no new facts and no new principles of law which either were not fully considered by the Commission when it adopted its opinion and order or, having been now considered, warrant either the vacation or the modification of such opinion and order.

The Commission orders:

The application for rehearing filed herein by Power Authority on November 30, 1956, be and it is hereby denied by the Commission.

By the Commission.

J. H. GUTRIDE
J. H. Gutride,
Acting Secretary.

APPENDIX D

Act of August 21, 1957, 71 Stat. 401
Public Law 85-159
85th Congress, H. R. 8643
August 21, 1957

AN ACT

To authorize the construction of certain works of improvement in the Niagara River for power, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: *Provided*, That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or

from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

(4) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraphs (1) and (3) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided*, That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall not exceed $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construction of the remedial works, including engineering and economic

investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed.

SEC. 2. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized.

Approved August 21, 1957.